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Additional papers.*

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IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

PAUL EDWARD SIMON,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

} No. 22,678

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

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I.

JURISDICTIONAL STATEMENT OF FACTS

On June 14, 1967, the Federal Grand Jury sitting at Tucson, Arizona, returned an Indictment charging Paul Edward Simon, Appellant herein and Synthia Anne Simon in three

Counts. (Clerk's Transcript of Record, page 4. Hereinafter the Clerk's Transcript of Record will be referred to as "RC"; the Reporter's Transcript will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line; Appellant Paul Edward Simon will be referred to as Paul or Appellant, and Synthia Anne Simon will be referred to as "Synthia.")

The three counts charged as follows: Count I charged Paul and Synthia with a conspiracy to import 24 pounds, 1 1/4 ounces of marijuana in violation of 21 U.S.C. §176a. Count II charged Paul and Synthia with a substantive violation of 21 U.S.C. §176a, occurring on or about May 26, 1967, involving the said marijuana and 1/4 ounce of Hashish. Count III charged Paul and Synthia with a substantive violation of 18 U.S.C. §545 involving 72 amphetamine and barbiturate pills and 27 percoden tablets (RC 4-6). Paul and Synthia appeared personally and by retained counsel, and pleaded not guilty on June 26, 1967 (RC, page 20).

Trial was held on October 26, 1967, before Judge James A. Walsh (RT 5). Before the Government rested, Government's counsel out of the hearing of the jury moved to dismiss Count I as to both defendants and Counts II and III as to Synthia Anne Simon and the Court granted the motion (RT 116, L 10-20).

Appellant moved for judgment of acquittal on the weight of the evidence and on the grounds the statute, 21 U.S.C. §176a, forced a defendant to incriminate himself (RT 118). The Court denied the motion (RT 118). Appellant offered his own testimony and rested (RT 135, L 22). Appellant's counsel did not renew his motion (See RT 135-136; counsel's argument, RT 136-144; 144-150; 150-153; Court's instructions

to the jury, 153-168; counsel had nothing further, RT 168, L 20-22).

The jury returned a verdict of guilty as to Counts II and III (RT 170, L 1-5).

On November 6, 1967, Appellant was adjudged guilty on Counts II and III and sentenced to five years on Count II and two years on Count III, to be served concurrently to sentence imposed on Count II (RC Item 7).

On November 6, 1967, Appellant filed Notice of Appeal (RC Item 8). Appellant remained on bond.

The Trial Court had jurisdiction by the provisions of 18 U.S.C. §3231. This Court has jurisdiction of this appeal by the provisions of 28 U.S.C. §1291.

## II.

### STATEMENT OF FACTS

On Friday, May 26, 1967, William Zimmerman was on duty at the Grand Avenue Gate, Nogales, Arizona, port-of-entry from Mexico (RT 19, L 1-16). Zimmerman saw Paul and Synthia enter the United States from Mexico in a car (RT 19, L 23 to 20, L 1). Synthia was lying in the back seat and Paul was driving (RT 20, L 6-8). He took no declaration but directed them to the Secondary Inspection area since they stated they were coming from Guaymas, Mexico (RT 20, L 13 to 21, L 9).

Zimmerman later went to the inspection area and saw Inspector Plemens and Eccleston removing packages from the springs of the rear seat and was told by them that a package

on the inspection table had been removed from under the dashboard (RT 22, L 9-24). He believed it was Eccleston who told him (RT 24, L 8-9).

Plemens testified that he asked Paul and Synthia for a declaration and they declared nothing (RT 27, L 6-9). Plemens testified that Eccleston, who was now stationed in the Virgin Islands (RT 26, L 19-23), had assisted him in the search of the car (RT 27, L 22-23). Plemens identified Government's exhibits 1 through 24 as the packages he and Eccleston removed from the rear seat springs (RT 28, L 13 to 30, L 17). Paul and Synthia were advised they were under arrest and their rights were read to them as follows:

"A I told them that: 'You are both under arrest as suspects for smuggling marijuana and that you don't have to say anything. If you do waive your rights, desire to waive your rights, anything you say can be used against you; and that you are entitled to a lawyer of your choosing. If you can't furnish one yourself, that one will be provided for you at the proper time.' And I didn't attempt to question them then." (RT 40, L 21 to 41, L 7)

The Court held a hearing out of the presence of the jury and found the statement which follows voluntary and not in response to any question (RT 33, L 21 to 39, L 15). Paul apologized to his wife, stated he was willing to pay the tax (RT 42, L 6-8).

Plemens identified Government's Exhibit 51 and 52 by his initials and that these exhibits and Government's Exhibits 1 through 24 were turned over to Customs Agent John Dennis (RT 45, L 14 to 17).

Plemens identified the contents of Government's Exhibit 53 and that they were turned over to Agent Dennis (RT 50).

Francis Baker testified he saw a bag which appeared to be like Government's Exhibit 52 in the hands of one of the Inspectors while the car in question was being searched (RT 53, L 6-23). He could not state if it was Eccleston or Plemens, but it was the inspector standing by the passenger side (RT 54, L 4-11). Plemens stood on the driver's side (RT 49).

(Since the balance of the chain of custody is not in issue, it will not be set out.)

Government's Exhibit 54 was identified by Agent Dennis as being two pills he found on Paul's person (RT 70). (Upon observation by the jurors Exhibit 54 was similar to the tablets which were in Government's Exhibit 51).

Customs Port Investigator Everett Turner transported Paul to the Customs Agency for processing (RT 73, L 1-11). A hearing was held out of the presence of the jury (RT 73, L 16 to 75, L 8). The Court permitted the statement in (RT 75, L 8). Turner asked Paul if he was sure he didn't want to call an attorney and Paul replied "he thought he needed a marriage counselor worse than a lawyer." (RT 76, L 4-7)

Paul took the stand and testified as follows: That he and his wife, Synthia, had been staying in Ajijic, Mexico, and had driven up to Guaymas, Mexico, to visit friends and didn't find them at home (RT 119-120). They spent the night on the beach and next morning Synthia attempted to light a beach fire, and her leg was burned by gasoline (RT 121).

Paul attempted to start his car and then sought the aid of some four or five Mexicans who were on the beach also (RT 121). Two of them offered to drive them to a doctor they knew (RT 122, L 12-17). The doctor did not answer or was not at home (RT 122, L 19-23). The two Mexicans

then drove them to a pharmacy, where she was treated with an ointment and given something for the pain (RT 123, L 9-11). The two Mexicans were asked by Paul to try and bring his car back (RT 123, L 11-15). They were gone half an hour (RT 123, L 17-21). Paul testified that his wife preferred to return to the United States, even though it was four hours away (RT 123, L 23 to 124, L 3).

They arrived at the border and he asked Zimmerman for first aid, and was informed there was no first aid facility at the border (RT 124, L 25 to 125, L 3).

He then described the search and stated he apologized to his wife about the delay (RT 125).

After he was under arrest he may have said something similar to what Turner testified to (RT 127, L 10-13).

In cross-examination Paul identified the pills and the Zig-Zag cigarette papers, Government's Exhibit 55, which were found on his person (RT 132, L 18-20) and admitted he had no tobacco with him (RT 133, L 1-2). He denied seeing the manicured marijuana and the other contents of Government's Exhibit 53 (RT 133, L 3-5).

He denied offering to Plemens to pay the tax on the marijuana immediately after being arrested for smuggling marijuana (RT 134, L 22-25).

### III.

#### OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court did not err in failing to grant the Mo-

tion for Acquittal as to Count II at the close of the Government's case.

2. The Trial Court did not err in failing to grant the Judgment of Acquittal as to Count III on the grounds that 21 U.S.C. §176a violates the privilege against self-incrimination.

#### IV.

#### SUMMARY OF ARGUMENT

1. The sentence imposed as to Count II was to run concurrently as to Count III and, therefore, the Court need not review the evidence as to Count III; furthermore, Appellant did not renew his motion at the close of all the evidence.

2. Compliance with 21 U.S.C. §176a would not constitute self-incrimination under Federal or State law.

#### V.

#### ARGUMENT

**1. The sentence imposed as to Count II was to run concurrently as to Count III and, therefore, the Court need not review the evidence as to Count III; furthermore, Appellant did not renew his motion at the close of all the evidence.**

This Circuit has held many times there is no need to review evidence on a separate count when the sentences are concurrent and do not exceed what could be imposed on either count. *Fenton v. United States* (9th Cir., 1962) 308 F.2d 246; *Castro v. United States* (9th Cir., 1963) 323 F.2d 683; *Page v. United States* (9th Cir., 1966) 356 F.2d 337.

Furthermore, Appellant did not renew his motion at the close of all the evidence. (Please see the Jurisdictional Statement herein.) Thus, this contention may be deemed waived. *Robbins v. United States* (9th Cir., 1965) 345 F.2d 930.

However, should the Court review the evidence in the light most favorable to the Government, *Glasser v. United States* (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, it would find that Zimmerman testified that he saw the bag on the inspection table next to the car and was told it was found under the dashboard (RT 22, L 16 to 23, L 7), and Plemens identified his initials on the brown paper bag. No objection was made to this testimony. Hearsay testimony is subject to objection, but if not objected to is competent evidence. *Udall's Arizona Law of Evidence* §12, page 24.

It is respectfully submitted that the conviction on Count III should be sustained since the sentence imposed was concurrent to the sentence imposed on Count II.

## **2. Compliance with 21 U.S.C. §176a would not constitute self-incrimination under Federal or State law.**

Appellant argues that to comply with 21 U.S.C. §176a would compel one to incriminate oneself under the Federal marijuana laws citing *Marchetti v. United States* (1968) 390 U.S. 39, 19 L.Ed. 2d 889; *Grosso v. United States* (1968) 390 U.S. 62, 19 L.Ed. 2d 923; *Haynes v. United States* (1968) 390 U.S. 85, 19 L.Ed. 2d .....

He likens 26 U.S.C. §4701 and the sections following to those of the wagering tax, i.e., that they were designed to elicit information in use for prosecutions. It is respectfully submitted that they do not.

Sections 4701 through 4736 of Title 26, U.S.C., cover narcotic drugs, which drugs are not in issue in this case.

Sections 4741 through 4774 of Title 26 U.S.C., do cover marijuana.

Title 26 U.S.C. §4741 imposes the tax. Title 26 U.S.C. §4742 provides for the Treasury Secretary to issue order forms for transfer of marijuana. Title 26 U.S.C. §4743 provides the tax stamps shall be affixed to the order form. Title 26 U.S.C. §4744 prohibits possession of marijuana not in or from the original stamped package, and only Government and State officials are exempted. Title 26 U.S.C. §4745 provides for forfeiture of such marijuana.

Title 26 U.S.C. §4751 imposes a tax on importers, manufacturers, etc., producers, physicians, dentists, etc., persons engaged in research; persons not otherwise taxed and millers. Title 26 U.S.C. §4752 provides for the computation and liability for the tax. Title 26 U.S.C. §4753 provides for the registration of those upon whom the tax is imposed in 26 U.S.C. §4753. Title 26 U.S.C. §4754 requires the registrants to make returns upon demand. Title 26 U.S.C. §4755 prohibits failure to register and to pay the tax and exempts employees of those who have registered, and employees of common carriers, those delivering for a physician who has prescribed it, etc. Title 26 U.S.C. §4756 makes sections 4701 and 4721 applicable insofar as not inconsistent.

Title 26 U.S.C. §4761 defines person, marijuana producer, transfer or transferred. Title 26 U.S.C. §4762 provides for the administration of this part of the chapter in Puerto Rico and the Virgin Islands.

Title 26 U.S.C. §4771 provides for the method of payment of the stamps. Title 26 U.S.C. §4772 provides for the exemp-

tion of employees of those who have registered and paid the tax, and government and state officials. Title 26 U.S.C. §4773 provides for the inspection of returns, order forms and prescriptions. Title 26 U.S.C. §4774 provides for the territorial extent of the law.

Practically every state, if not all states, have adopted the Uniform Narcotic Act; Arizona's is found in Arizona Revised Statutes, Sections 36-1001 et seq.

A.R.S. §36-1001 (16) provides:

"'Official written order' means an order written on a form provided for that purpose by the United States commissioner of narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by the board of health."

A.R.S. §36-1002.05 provides in part:

"A. Every person who knowingly grows, plants, cultivates, harvests, dries, or processes any marijuana, or any part thereof, or who knowingly possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison for not less than one year nor more than ten years but for the first offense the court may impose a fine not exceeding one thousand dollars, imprisonment in the county jail not exceeding one year or both."

A.R.S. §36-1002.06 provides in part:

"A. Every person who possesses for sale any marijuana except as otherwise provided by law shall be punished by imprisonment in the state prison for not less than two years nor more than ten years, and shall not be eligible for release upon completion of sentence, or on parole, or on

any other basis until he has served not less than two years in prison."

A.R.S. §36-1002.07 prohibits importation and transportation in the state.

A.R.S. §36-1005 provides:

"A. A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but *only on official written orders*:

- "1. A manufacturer, wholesaler or apothecary.
- "2. A physician, osteopath, dentist or veterinarian.
- "3. A person in charge of a hospital or laboratory, but only for use by or in such institutions for scientific or medical purposes.

"B. A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

"1. *On a special written order* accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territorial, district, county, municipal or insular government, purchasing, receiving, possessing or dispensing narcotic drugs by reason of his official duties.

"2. A person in charge of any ship or aircraft, when such ship or aircraft is not in port, upon which no physician is regularly employed, for the actual medical needs of a person on board, and only in pursuance of a special order on a form approved by a commissioned medical officer or assistant surgeon of the United States public health service.

"3. A person in a foreign country if the provisions of the federal narcotic laws are complied with.

"C. *An official written order* for any narcotic drug shall be signed in duplicate by the person giving it or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drugs named

therein. In event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this article. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the federal narcotic laws, respecting the requirements governing the use of order forms.

"D. Possession of or control of narcotic drugs obtained as authorized by this section shall be lawful if in the regular course of business, occupation, profession, employment or duty of the possessor.

"E. A person in charge of a hospital or a laboratory, or in the employ of this or any other state, or of any political subdivision thereof, or a proper officer of a ship or aircraft, who obtains narcotic drugs under the provisions of this article shall administer, dispense or otherwise use such drugs only for scientific or medicinal purposes and within the scope of such employment or official duty." (emphasis added)

A.R.S. §36-1009, provides:

"A. Every physician, osteopath, dentist, veterinarian or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed or professionally used by him otherwise than by prescription. It shall, however, be deemed sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such person using small quantities of solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without

keeping a record of the amount of such solution or other preparation applied by him to individual patients. But no record need be kept of narcotic drugs administered, dispensed or professionally used in the treatment of any one patient, when the amount administered, dispensed or professionally used for that purpose does not exceed in any forty-eight consecutive hours:

"1. Four grains of opium.

"2. One half grain of morphine or any of its salts.

"3. Two grains of codeine or any of its salts.

"4. A quantity of any other narcotic drug or any combination of narcotic drugs that does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated.

"B. Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown or by any other process produced or prepared, or received and disposed of by them, in accordance with the provisions of subsection E of this section.

"C. Apothecaries shall keep records of all narcotic drugs received and disposed of by them in accordance with the provisions of subsection E of this section.

"D. Every person who purchases for resale, or who sells narcotic drug preparations exempted by §36-1008, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection E of this section.

"E. The form of records shall be prescribed by the board of health. The record of narcotic drugs received shall in every case show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of

manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced, and the proportion of resin contained in or producible from the dried flowering or fruiting tops of the pistillate plant cannabis sativa L., from which the resin has not been extracted, received or produced. The record of all narcotic drugs sold, administered, dispensed or otherwise disposed of, shall show the date of selling, administering or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered or dispensed, and the kind and quantity of drugs. Every such record shall be kept for a period of two years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction or theft."

A.R.S. §36-1010, requires a dispenser of narcotic drugs to affix on drugs being dispensed the registry number, which as defined by A.R.S., §36-1001, subsection 18, means the number assigned to each person registered under the federal narcotic laws. A.R.S., §36-1014 provides that all narcotic drugs, the lawful possession of which is not established, should be delivered to a state officer for destruction by the United States commissioner of narcotics.

It is respectfully submitted that the term "lawful possession" encompasses possession that is lawful under Federal law. It can be argued that technically a person could be arrested under the State narcotic laws and upon a showing of a registry number by a person registered under the federal narcotic laws

or an order issued by the commissioner of narcotics would be acquitted only after trial by the raising of an affirmative defense. It can also be argued that it is an affirmative matter to be raised on a federal charge, i.e., that the possession is lawful under federal laws. However, the compliance with the Federal narcotic laws would constitute a lawful possession under State laws. A.R.S. §36-1011 and §36-1012, however, sets out that the restrictive provisions of the act shall not apply to agents, employees, etc., of those who lawfully may possess it.

Thus, compliance with Federal laws would constitute compliance with state laws.

The registration requirements are directed at controlling marijuana and are not directed principally at those who have failed to comply, which is the opposite of the National Firearms Act, 48 Stat. 1326 as was held in *Haynes v. United States*, *supra*, at page 96.

To apply the reasoning of the *Marchetti*, *Grosso* and *Haynes* cases to importation of marijuana would do the following:

A person entering the United States must declare purchases in a foreign country. If the purchases consisted of \$110.00 of rugs, the purchaser must declare them and pay the duty, if any. If he does not declare them, the purchaser has violated 18 U.S.C. §545. If the purchases consisted of marijuana he does not have to declare them, because he would incriminate himself.

(Appellant's counsel even cites from Chief Justice Warren's dissent, *Marchetti v. United States*, *Grosso v. United States*, *supra*, at page 84 wherein Chief Justice Warren reasons that 18 U.S.C. §1407 would be declared unconstitutional. Title 19 C.F.R. §23.9a was amended to provide that a person on

re-entering the United States must be afforded the opportunity to register. Thus, a person upon re-entering the United States who has not registered is given the opportunity to register. He can no longer be prosecuted for not registering upon re-entering the country. Thus, there is no possibility of self-incrimination.)

It is respectfully submitted that 21 U.S.C. §176a and 18 U.S.C. §545 are not unconstitutional.

## VI. CONCLUSION

It is respectfully submitted the Appellant waived the issue of the sufficiency of the evidence on appeal and 21 U.S.C. §176a and 18 U.S.C. §545 are not unconstitutional.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United

States Court of Appeals for the Ninth Circuit, and that in  
my opinion, the foregoing Brief is in full compliance with  
those rules.

*Jo Ann D. Diamos*  
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Three copies of the Brief of Appellee mailed this 13<sup>th</sup>  
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